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97TH CONGRESS, 2d Session } SENATE { REPORT No. 97-374

AUTHORIZING THE EXCHANGE OF CERTAIN LAND HELD BY THE NAVAJO TRIBE AND THE BUREAU OF LAND MANAGEMENT

APRIL 29 (legislative day, APRIL 13), 1982.—Ordered to be printed

Mr. COHEN, from thee Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 159]

The Select Committee on Indian Affairs, to which was referred the bill (S. 159) to authorize the exchange of certain land held by the Navajo Tribe and the Bureau of Land Management, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

The amendment in the nature of a substitute is as follows:

Strike out all after the enacting clause and insert the following:

That (a) subject to the approval of the Secretary of the Interior and to the provisions of this Act, the Navajo Tribe is authorized to exchange any surface interests of such Tribe in the lands described in subsection (b) for surface interests of the United States in lands described in subsection (c) which are approximately equal in value to such tribal interests.

(b) Lands located within the following New Mexico principal meridian townships are described in this subsection:

Township 8 north, range 12 west;
Township 8 north, range 11 west;
Township 7 north, range 12 west;
Township 8 north, range 11 west;
Township 6 north, range 12 west;
Township 7 north, range 5 west;
Township 6 north, range 5 west;
Township 6 north, range 4 west;
Township 6 north, range 3 west; and
Township 7 north, range 3 west.

(c) The lands described in this subsection are the lands withdrawn for exchange by Public Land Order 5721 (Federal Register, May 2, 1980, pages 29295–29297) other than the following lands:

Township 23 north, range 13 west, New Mexico principal meridian; section 3, southeast quarter; section 13, southeast quarter; and section 28, southwest quarter;

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Township 16 north, range 10 west, New Mexico principal meridian: section 6, southeast quarter; and section 18, northeast quarter; and

Township 22 north, range 10 west, New Mexico principal meridian: section 16, north half and southwest quarter.

SEC. 2. Any interests in lands acquired by the Navajo Tribe under section 1(a) shall be held by the Secretary of the Interior in trust for the benefit and use of the Navajo Tribe.

SEC. 3. (a) Lands received by the Navajo Tribe in an exchange under section 1(a) shall be subject to such easements or rights-of-way as the Secretary of the Interior may create in order to provide necessary access to Federal lands adjacent to such lands. The Secretary of the Interior may create such an easement or right-of-way only after he has consulted the governing body of the Navajo Tribe with regard to the location, scope, and use of such easement or right-of-way.

(b) Nothing in this Act shall affect—

(1) the mineral interests of any person, or

(2) any easement or other rights of any person (other than the United States or the Navajo Tribe),

in lands exchanged under section 1(a) which existed prior to the enactment of this Act. The development of such interests and the exercise of such rights may only be controlled by the Navajo Tribe or the Secretary of the Interior to the same extent that such development or exercise could have been controlled by the Secretary of the Interior prior to the enactment of this Act.

SEC. 4. (a) No exchange shall be made under section 1(a) if, at the time such exchange is proposed, the value of the interests in lands described in section 1(b) which are proposed to be exchanged exceeds an amount equal to 125 percent of the value of interests in lands described in section 1(c) which are proposed to be exchanged.

(b)(1) If, at the time of an exchange under section 1(a), the value of the interests in lands described in section 1(b) which are exchanged under section 1(a) exceeds the value of the interests in lands described in section 1(c) which are exchanged under section 1(a), the Secretary of the Interior shall pay to the Navajo Tribe an amount equal to such excess value.

(2) If, at the time of any exchange under section 1(a), the value of the interests in lands described in section 1(c) which are exchanged under section 1(a) exceeds the value of the interests in lands described in section 1(b) which are exchanged under section 1(a), the Navajo Tribe shall pay to the United States an amount equal to such excess value.

SEC. 5. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of section 4(b)(1).

PURPOSE

The purpose of S.159 is to authorize the exchange of the surface rights to certain lands located in the northwestern region of New Mexico held in fee title by the Navajo Tribe for surface rights to lands in the same area held by the Bureau of Land Management, subject to the approval of the Secretary of the Interior. The lands received in the exchange by the Navajo Tribe would be held in trust by the United States for the Navajo Tribe.

BACKGROUND AND NEED

The northwestern region of the State of New Mexico has a history of very complex land ownership: lands are held by the State, Federal government, private individuals and tribal governments. This intermingled, or "checkerboard" pattern of ownership has resulted in conflicting land claims and serious delays in the development of the land, and has handicapped the Bureau of Land Management's (BLM) ability to properly manage the public lands within its jurisdiction.

Widespread occupancy of public lands by members of the Navajo Tribe forms a major part of this checkerboard pattern. The status of the land in this area has become so confused as to be a serious concern to local, tribal, Federal and State governments, as well as to the private landowners. The Navajo occupancy, which has increased over the years, caused the Secretary of the Interior, in 1974, to order the resolution of the so-called "unauthorized occupancy" by Navajo people on the public lands.

Navajos have lived in the Four Corners (northwestern) area of New Mexico for approximately 475 years. Occupancy on public land in the off-reservation areas has not developed because of any mass migrations, but rather, because of the confusing land patterns and history of land ownership. Navajo people have grazed their livestock on off-reservation lands, under BLM permits, for many years, and some of these people have built homes where it was most convenient to the grazing areas. In 1907, Executive Order No. 709 withdrew portions of the public lands, in what are now the northwestern counties of San Juan and McKinley, New Mexico, for use by the Navajo Tribe. This authorized use was later terminated by orders restoring all unpatented lands in the area to the public domain. However, the use of these lands by individual people did not cease with the issuance of Executive orders.

The checkerboard land pattern, coupled with the lack of adequate survey markers, has made it very difficult, at times impossible, to determine the nature of the ownership to the lands in the northwestern region of New Mexico.

In 1974, when the BLM identified the problem and verified unauthorized occupancy on public lands by the Navajo, the BLM and BIA surveyed the area. After months of study and years of meetings, the State, Federal government, Navajo Tribe and individual landowners agreed that the only solution was the exchange of lands between the BLM and the Tribe: A solution which assured that the individual Navajos now occupying the BLM lands would not have to be relocated. It was further agreed that the lands acquired by the Tribe, in such exchange, would be held in trust by the United States on behalf of the Navajo Tribe.

The Navajo Tribal Council appropriated funds to purchase the necessary private lands to offer in exchange for the BLM lands. The Navajo Tribe has acquired fee title to the surface rights of certain private lands; lands identified by the BLM as enhancing BLM multiple-use management programs. Under an agreement reached between the BLM and the Tribe, in 1979, the BLM will acquire all of the interests in approximately 79,800 acres owned by the Navajo Tribe, as described in S. 159, in exchange for the surface rights of public lands of equivalent market value, as described in S. 159. Approval of this agreement will result in the transfer of approximately 57,000 acres of public land to the Tribe and 79,800 acres of private land to the BLM.

Although there is legal authority for the exchange of lands between the Navajo Tribe and the BLM, there is no current legal authority for placing the lands acquired by the Tribe through the exchange in trust. S. 159 would allow the United States to hold the acquired lands in trust for the Navajo Tribe.

S. 159 authorizes the Secretary of the Interior to create, after consulting with the Navajo Tribe's governing body, easements and rights-of-way to provide access to Federal lands adjacent to the lands received by the Navajo Tribe, pursuant to this Act. The bill also ensures that the interest held by third parties in the subsurface of the lands to be exchanged will not be effected.

The Chairman of the Navajo Tribe has communicated to the Committee that he has no objection to the passage of S. 159.

LEGISLATIVE HISTORY

On January 19 (legislative day, January 5), 1981, Senator Harrison Schmitt of New Mexico introduced S. 159, which was referred to the Senate Select Committee on Indian Affairs. The Committee held hearing on the bill on July 30, 1981, and reported the bill favorably, with an amendment in the nature of a substitute, on April 28, 1982.

H.R. 3589, a similar bill, was introduced in the House of Representatives by Congressman Joe Skeen of New Mexico and referred to the House Interior and Insular Affairs Committee. The Committee held hearing on the bill on October 20, 1981 and reported the bill favorably, with an amendment in the nature of a substitute, on March 24, 1982. The bill is pending House floor action.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, by a poll of its Members on April 28, 1982, voting 7 in favor and 0 opposed, recommends that the Senate pass S. 159, as amended.

COMMITTEE AMENDMENTS

The Select Committee on Indian Affairs adopted an amendment in the nature of a substitute in order to make all technical, correcting, and clarifying changes.

SECTION-BY-SECTION ANALYSIS OF S. 159, AS AMENDED

Section 1 authorizes the exchange of the surface interests in certain lands owned by the Navajo Tribe for surface interests in certain lands owned by the Bureau of Land Management, subject to the approval of the Secretary of the Interior.

Section 2 provides that the lands acquired by the Navajo Tribe, pursuant to this exchange, shall be held in trust by the Secretary of the Interior for the benefit and use of the Navajo Tribe.

Section 3 provides that the lands received, in this exchange, by the Navajo Tribe shall be subject to such easements and rights-of-way as the Secretary of the Interior may create in order to provide access to Federal lands adjacent to these lands, after consultation with the Tribe as to the location, scope and use of such easements and rights-of-ways. Section 3 further provides that the rights and interests of third parties in the lands to be acquired by the Navajo Tribe shall not be affected by this Act and that these interests and rights shall be controlled by the Tribe or the Secretary only to the extent that they could

have been controlled by the Secretary prior to the enactment of S. 159.

Section 4 prohibits the exchange of lands if the value of the lands to be acquired by the Bureau of Land Management exceeds an amount equal to 125 percent of the value of the lands to be acquired by the Navajo Tribe. Section 4 further provides for the equalization of value of the lands by monetary payment.

Section 5 authorizes the appropriation of monies necessary to carry out the monetary compensation should the value of the lands acquired by the Bureau of Land Management exceed the value of the lands acquired by the Navajo Tribe.

COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 159, as amended, as provided by the Congressional Budget Office, is outlined below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., April 28, 1982.

Hon. WILLIAM S. COHEN,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 159, a bill to authorize the exchange of certain land held by the Navajo Tribe and the Bureau of Land Management, and for other purposes, as amended and ordered reported by the Senate Select Committee on Indian Affairs, April 28, 1982.

Based on this review, it is expected that no net cost to the government would be incurred as a result of enactment of this bill. This bill identifies particular parcels of land that, subject to the approval of the Secretary of the Interior, the Navajo Tribe may exchange with other parcels. This bill also allows for cash payments to equalize any differences in value that may occur. Since final values and exchange agreements are yet to be determined, it is not possible to estimate what, if any, cash payments will be necessary.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompaying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill.

The Committee believes that S. 159, as amended, will have no regulatory or paperwork impact.

EXECUTIVE COMMUNICATION

The legislative report on S. 159 received by the Committee from the Department of the Interior is set forth below:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., July 1981.

HON. WILLIAM S. COHEN,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Your Committee has requested the views of this Department on S. 159, a bill "To authorize the exchange of certain land held by the Navajo Tribe and the Bureau of Land Management, and for other purposes."

Absent any objections from state and local interests, we would have no objection to enactment of the bill if amended and clarified as suggested herein.

S. 159 would authorize the Secretary of the Interior to convey approximately 57,000 acres of public lands to the Navajo Tribe as Trust lands in exchange for approximately 80,000 acres of lands which the Tribe acquired for use in the exchange.

The exchange would resolve a longstanding situation involving about 350 unauthorized Indian occupancies and would assist in the consolidation of Federal land ownership in the Malpais Natural Area, a unique cultural area in the west central part of New Mexico.

The "unauthorized occupancy" of public lands by the Navajo Tribe began in 1907 when the United States by Executive Order 709 provided portions of public lands in what are now San Juan and McKinley Counties for use by the Navajo Tribe. This authorized use was terminated in two stages: (1) by Executive Order 1000 (1908) and (2) Executive Order 1284 (1911). All unpatented lands were restored to public domain. However, the Navajo people continued to use these lands after the Executive Orders were issued.

The Navajo people have been grazing their livestock in off-reservation areas under Bureau of Land Management (BLM) grazing permits for many years. Some of these people built homes where it was most convenient for the grazing.

Although S. 159 authorizes the proposed land exchange between the Navajo Tribe and BLM, authority for this action already exists as to BLM in section 206 of the Federal Land Policy and Management Act of October 21, 1976 (90 Stat. 2743, 43 U.S.C. 1716) and as to land owned in fee by the Navajo Tribe in section 5(b) of the Act of April 19, 1950 (64 Stat. 44, 46) as amended (25 U.S.C. 635(b)). However, legislation is necessary to authorize the Secretary of the Interior to accept and hold the lands in trust for the Navajo Tribe and to add the lands to the Navajo Reservation because of the restriction in section 2 of the Act of 1918 (40 Stat. 570; 25 U.S.C. 211) and of the fact that the authority in sections 5 and 7 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 986; 25 U.S.C. 467) does not apply to the Navajo Tribe.

Section 1 of S. 159 describes the lands which the Navajo Tribe may exchange for land held by the Bureau of Land Management. According to our information, there are a number of typographical errors in the land descriptions contained in the bill. Further, although it has been the intention of both the Navajo Tribe and the Bureau of Land Management to exchange only the surface interests of the involved lands,

the bill is not clear on that point. To minimize the potential for erroneous land descriptions and to insure that there is no confusion as to the interests being exchanged, we suggest that paragraph (1) of section 1 beginning on page 1, line 5 through page 3, line 8 be amended to read:

> (1) the Navajo Tribe may convey to the United States any or all of its surface interests in lands located within the following New Mexico principal meridian townships:
>
> Township 8 north, range 12 west;
> Township 8 north, range 11 west;
> Township 7 north, range 12 west;
> Township 7 north, range 11 west;
> Township 6 north, range 12 west;
> Township 7 north, range 5 west;
> Township 6 north, range 5 west;
> Township 6 north, range 4 west;
> Township 6 north, range 3 west; and
> Township 7 north, range 3 west.

Also for the purpose of avoiding errors in land descriptions, section 1, paragraph (2), beginning on page 3, line 9 through page 18, line 9 should be amended to read:

> (2) for surface interests in land of equal value held by the Bureau of Land Management and such land to be selected from the list of land as follows:
>
> Land withdrawn for exchange by Public Land Order 5721, published in the Federal Register May 2, 1980, pages 29295–29297, except the following described land:
>
> Township 23 north, range 13 west, New Mexico principal meridian: section 3, southeast quarter; section 13, southeast quarter; and section 28, southwest quarter.

The BLM parcels are scattered over a wide area encompassing three counties. Therefore, each tract selected for exchange will have to be valued on an individual basis. The last appraisal of the BLM lands was done by Bureau of Indian Affairs (BIA) in 1977 at which time their value varied from $67–$200 per acre. The tribal fee lands were purchased in 1976 at an average cost of $40 per acre. Since these appraisals were outdated, BLM has completed new appraisals of both the offered and selected lands. We recommend that the bill make it clear that the value of the exchanged lands will be equal. Because finding lands of equal value is often difficult, we also recommend that section 1, on page 18, be amended by adding the following new paragraph 3 after line 9:

> (3) If the appraised values of lands proposed for exchange are not equal, the values shall be equalized by the payment of money to the grantor or the Secretary as the circumstances require so long as the payment does not exceed 25 per centum of the total value of the lands or interests transferred out of Federal ownership.

Section 2 provides that the land to be acquired by the Navajo Tribe in this exchange be held in trust by the United States. We feel that the bill should clearly state that this land be added to the Navajo Reservation. This would entitle the tribal members living on this land to share in the same Federal program services which are available to tribal members within the Navajo Reservation.

We understand that the Navajo Tribal Council has requested that this land be formally declared a part of the reservation in order that full tribal jurisdiction and powers may be exercised uniformly on all lands held in trust for the tribe. Therefore, we recommend that section 2 be amended to read:

> SEC. 2. The land acquired by the Navajo Tribe in this exchange shall upon acquisition be held in trust by the United States for the Navajo Tribe and be a part of the Navajo Reservation.

Section 3 provides that where lands with reserved minerals and other interests outstanding in third parties are accepted by the Secretary in trust for the Navajo Tribe, and for addition to the Navajo Reservation, the United States, its lessons, and permittees shall have access to develop such reserved minerals or other interests.

To clarify rights for access to adjoining lands and development of interests owned by third parties, we recommend that section 3, page 18, line 12 through line 4, on page 19 be amended to read:

> SEC. 3. (a) Where lands which are subject to reserved minerals and other interests in third parties are accepted by the Secretary of the Interior in trust for the Navajo Tribe, for addition to the Navajo Reservation, nothing in this Act, nor any exercise by the Secretary of the powers it confers, shall adversely affect the rights of such third parties to have access to and to develop such reserved interests. The acceptance of such lands in trust and for addition to the Navajo Reservation shall not affect any valid existing rights of access of adjoining or other nearby lands. The exercise of such rights shall not be subject to the control of the Navajo Tribe or the Bureau of Indian Affairs to any greater extent than was permissible under existing law at the date of acceptance by the Secretary.
>
> (b) The lands transferred to the Navajo Tribe pursuant to this Act shall be subject to such rights-of-way as the Secretary of the Interior may now or hereafter consider necessary to provide access to adjoining or nearby Federal lands. The Secretary shall consult with the Navajo Tribe as to the location and scope of use of any such right-of-way.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

KEN SMITH,
Assistant Secretary.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., October 5, 1981.

Hon. WILLIAM S. COHEN,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your September 4, 1981, letter in which you requested certain information concerning our recommendation that S. 159 be amended to provide that any lands acquired by the Navajo Tribe pursuant to that legislation be declared a part of the Navajo Reservation.

First, you asked why the Department recommended this amendment. The Department is recommending that the lands be declared a part of the reservation in order to resolve their jurisdictional status and avoid litigation on that issue in the future. Because the lands have long been occupied by Navajo Indians and are located relatively close to the Navajo Reservation, the Department believes that they should be treated the same as the existing reservation.

It continues to be unclear whether simply taking land in trust for a tribe confers reservation status on the land involved. This is illustrated by the discussion of issues by the U.S. Supreme Court in *United States* v. *John*, 437 U.S. 634, 649 (1978). The Supreme Court said there is "no apparent reason" why lands taken into trust for the benefit of the Mississippi Choctaw Indians did not become a "reservation" at least for purposes of Federal criminal jurisdiction at that time. The Court continued, however, by stating that any doubts were resolved by the proclamation five years later that the lands constituted a reservation. The Department is recommending that any such doubts with respect to the lands involved in S. 159 be resolved by explicitly adding them to the Navajo Reservation in the legislation.

Second, you asked what the effect on jurisdictional authority would be if the land is taken in trust, but not included in the Navajo Reservation. Even if the lands do have reservation status (either because Congress explicitly says so or because taking land into trust for a tribe automatically has that effect), the exact effect on State, Federal and tribal jurisdiction is not entirely clear. Certain aspects on the distribution of jurisdiction on reservations are still the subject of litigation. Declaring the lands to have reservation status will resolve some, but not all, jurisdictional disputes.

In general, however, the Federal Government has jurisdiction on Indian reservations over crimes committed by Indians against non-Indians or committed by non-Indians against Indians. The Federal Government also has jurisdiction over certain major crimes listed in 18 U.S.C. 1153, when committed by Indians regardless of who the victim is. Tribes have jurisdiction over offenses committed by Indians and States have jurisdiction over offenses committed by non-Indians. Legal uncertainties are common with respect to offenses that appear to be subject to more than one jurisdiction. The courts have not, for example, clarified whether Federal jurisdiction over offenses by non-Indians against Indians is exclusive or whether tribes have concurrent jurisdictions with the United States over the offenses punishable under the Major Crimes Act.

Generally, tribes have civil jurisdiction (including taxing authority) over Indians and States have civil jurisdiction and taxing authority over non-Indians. The scope of both tribal and State jurisdiction over non-Indian activities that have an impact on Indians is at issue in a number of suits presently in the courts.

Even if these lands do not obtain reservation status when taken into trust, they may well be "dependent Indian communities" as the term is used in the definition of "Indian country" in 18 U.S.C. 1151(b). See *United States* v. *Martine*, 442 F. 2d 1002 (10th Cir. 1971). As the *Martine* decision indicates, whether a particular area is a dependent Indian community depends on who lives there and what relation they

have to the tribal and Federal governments. It is clear that Federal criminal jurisdiction is the same as it is on a reservation. It is not clear, however, whether tribal and State jurisdiction would be the same. See *General Motors Acceptance Corp.* v. *Chischilly*, 628 P. 2d 683 (N.M. 1981).

Finally, you asked whether taking the land in trust, but not making it a part of the Navajo Reservation, would affect the eligibility of the residents of the lands for services of the Bureau of Indian Affairs and the other related agencies' services. The Navajo Indians on these lands have received full BIA services for many years through the Eastern Navajo Agency even though they do not live on lands currently designated as reservation lands. They will continue to receive those services regardless of whether or not Congress declares those lands to be added to the Navajo Indian Reservation.

Congress is free to specify the jurisdictional arrangement it wishes on Indian lands. As discussed above, our recommendation is that this land have the jurisdictional status of the Navajo Reservation. It is our view, however, that whatever jurisdictional arrangement Congress prefers should be specified in the legislation in order to reduce future litigation.

If we can be of any further assistance to you, please do not hesitate to contact us.

Sincerely,

KEN SMITH,
Assistant Secretary—Indian Affairs.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by S. 159, as amended.

O